STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of-

James Kotowski
6600 West Forest Home Avenue
Milwaukee, Wisconsin 53220

PECFA Claim: #53220-2406-00
Hearing: #97-190

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed November 24, 1997, under § 101.02 (6) (e) Wis. Stats., and §Comm/ILHR 47.53 Wis. Adm. Code, to review a decision of the Wisconsin Department of Commerce (Department), a hearing was commenced on March 9, 1999, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on November 24, 1999 and the par-ties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department correctly determined that the soil and groundwater contamination present at the sites involved in this matter constituted one occurrence.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

James Kotowski
6600 West Forest Home Avenue
Milwaukee, Wisconsin 53220

By: Rachel A. Schneider, Esq.
Quarles & Brady
411 East Wisconsin Avenue, Suite 2050
Milwaukee, Wisconsin 53202-4497

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kelly Cochrane, Esq.
Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02 (3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important or you must describe your new evidence and tell why you did not have it available at the hearing in this

matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received-by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in §227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated:

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: January 4, 2001
Mailed By: Linda K. Esser

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

MADISON HEARING OFFICE

IN THE MATTER OF: The claim for reimbursement under the PECFA Program by

1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (606)242-4813

James Kotowski
6600 W Forest Home Avenue
Milwaukee, WI 53220

Hearing Number: 97-190
Re: PECFA Claim #53220-2406-00

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the Proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Terry W. Grosenheider, Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:
James H. Moe

DATED AND MAILED:
November 24, 1999

* *

MAILED TO:

Appellant Agent or Attorney

Rachel A Schneider
Quarles & Brady
411 E Wisconsin Avenue
Milwaukee, WI 53202-4497

Department of Commerce

Kelly Cochrane
Assistant Legal Counsel
P.O. Box 7838
Madison, WI 53707-7838

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT

In the Matter of the claim for Reimbursement under the PECFA Program by

James Kotowski
6600 W Forest Home Avenue
Milwaukee, WI 53220

Hearing No. 97-190
PECFA Claim No. 53220-2406-00

PROPOSED DECISION

On October 24, 1997, the Wisconsin Department of Commerce (department) issued a decision denying the request by James Kotowski (appellant) for reimbursement of certain costs under the PECFA program and refunding one deductible which had previously been assessed. The appellant filed a timely request for hearing. The Secretary of the department delegated administrative law judge James H. Moe, of the Wisconsin Department of Workforce Development (previously the Department of Industry, Labor and Human Relations), to act as state hearing officer.

Pursuant to an agreement of the parties at a telephone preheating conference, the hearing on the appeal was set for March 9, 1999, at Madison, Wisconsin. The hearing was held as scheduled, with attorney Kelly Cochrane representing the department and attorney Rachel Schneider representing the appellant. Prior to the hearing, the parties agreed that the sole issue to be decided at the hearing was whether the department correctly determined that the soil and groundwater contamination present at the sites constituted one occurrence.[1] Following the hearing, briefs were received from each party. The matter is now ready for the issuance of a proposed decision.

Based on the testimony taken at the March hearing, the exhibits received into evidence at that hearing, and the subsequent briefs of the parties, the state hearing officer makes the following

[1] On a previous claim submitted by the appellant, the department had determined that two occurrences existed and applied two statutory deductibles of $5,000. On the subsequent claim, which is the subject of this appeal, the department determined that only one occurrence existed, and applied the then applicable statutory deductible of $7,500 per occurrence. Accordingly, the department reimbursed the $2,500 difference to the appellant.

PROPOSED FINDINGS OF FACT

At all times material, James Kotowski, had been the legal owner of two adjacent parcels of property located at 6000 and 6030 West Forest Home Avenue in Milwaukee, Wisconsin. Mr. Kotowski operates a used car dealership from the Sites. He purchased the eastern site (Site No. 2) in July of 1978. At the time of purchase, a vacant gas station occupied the site. Prior to his purchase, three underground storage tanks (USTS)[2] had been removed from the property. Site No. 2 contains one building that is

currently used as an office/service garage for the used car business. At the time he purchased Site No. 2, the adjacent parcel to the west (Site No. 1) contained a Citgo Oil Company convenience store. He purchased that property from Citgo Oil Company in 1986, and uses it as a parking lot. Site No. 1 contains one building.

In May of 1991, three 10,000-gallon unleaded gasoline USTs were removed from Site No. 1. These tanks were located near the northwestern boundary of Site No. 1. At that same time, a 500-gallon waste oil UST and a 1,100-gallon fuel oil UST were removed from Site No. 2. The waste oil UST was located just to the southeast of the office building located in Site No. 2, and the fuel oil UST was located on the northeastern side of the office building.

Soil samples taken at the time of the May 1991 tank removal indicated the presence of contamination on Site No. 2 near the waste oil tank on Site No. 2, and contamination on Site No. 1 near the gasoline USTs and the former pump island.[3] The detected contamination was reported to the Wisconsin Department of Natural Resources (DNR), which advised Mr. Kotowski appropriate actions had to be taken to remediate the sites. Two site numbers and two priorities for the remediation activities were assigned.

During a site investigation in November of 1991, two test borings and seven monitoring wells were installed, and soil samples obtained. Those samples confirmed contamination in the area of the former waste oil UST on Site No. 2, and in the area near the west end of the former pump islands on Site No. 1. No soil contamination above DNR guidelines was detected in the area of the former USTs on Site No. 1, and no further soil remediation was required in that area beyond the removal of those USTs.

In December of 1991, groundwater samples were obtained from each monitoring well. Petroleum constituents above DNR enforcement standards were detected in the samples obtained from MW-3 (former USTs on Site No. 1), MW-5 (waste oil UST on Site No. 2), and MW-6 (near former gasoline UST's removed on Site No. 2 prior to Mr. Kotowski obtaining the property).

In January of 1993, a Remedial Action Plan proposing the installation of three groundwater extraction wells to be used in conjunction with an air stripper to remove contaminants from the groundwater was submitted to the to the DNR. Two of the groundwater extraction wells were installed in July of 1993 and the third was installed in December of that year.

In November of 1993, groundwater samples were again obtained from each monitoring well. Petroleum constituents above DNR enforcement standards were again detected in the samples obtained from MW-3, MW-5, and MW-6.

[2]Two 6,000 gallon unleaded gasoline tanks and one 6,000 gallon leaded gasoline tank.

[3]A canopy remains on the Site over the former pump islands.

In December of 1993, based on the results of the site investigation, the impacted soils were excavated from two suspected source areas. Excavation Area 1 was located in the area of the former waste oil UST on Site No. 2 and Excavation Area 2 was located in the area of the test boring 2 on Site No. 1. When field screenings of the soil samples obtained from Excavation Area 1 revealed contamination greater than had been expected, excavation was halted to allow for an investigation of the extent of the contamination. Four test pits were then excavated extending radially out from Excavation Area 1. Soil samples confirmed that the extent of the contamination was greater than expected. MW-5 was abandoned during the excavation of Excavation Area 1. Closure samples 35 and 36 (sidewalls) and

37 (floor) were taken from Excavation Area 2 for analysis. The samples were not analyzed for Diesel Range Organics (DRO). Petroleum constituents above DNR enforcement standards were not detected in soil samples 35 and 36. Gasoline Range Organics (GRO) were detected at 11.7 parts per million (ppm) in soil sample 37. At the time, the DNR enforcement standard for GRO was 10 ppm.

Based on the soil samples from Excavation Area 1 and the soil samples from test pits 3 and 4, the extent of the impacted soils on Site No. 2 needed further delineation. Accordingly, in June of 1994, six additional soil borings were advanced and soil samples obtained. These borings were each converted into a monitoring well (MW-11 through MW-15 and MW-5R (to replace MW-5 which was taken out during the excavation of Excavation Area I)). Petroleum constituents above DNR enforcement standards for benzene and lead were detected in MW-11, located at the northeast comer of Site No. 2. Gasoline Range Organics (GRO) was detected in the soil samples from MW-12, located on Site No. 2 near the property edge on S. 60th Street about midway. GRO and Diesel Range Organics (DRO) was detected in both soil samples from MW-14, located on Site No. 1 just southeast of the southeast comer of the canopy. The detects in MW-12 and MW-14 contained petroleum constituents below DNR enforcement standards.

Groundwater samples were obtained from MW-1 through MW-7 in August of 1994. Petroleum constituents exceeding DNR enforcement standards were detected in the samples obtained from MW-3, MW-7 (located west of the former gasoline USTs on Site No. 2), MW-11 and MW-14.

Additional excavation activities were undertaken in September of 1994 to remove the impacted soils. The excavation began in the area of test pit 4 near MW-14 on Site No. 1 and proceeded onto Site No. 2. The excavation started at that point as the extent of the contamination was believed to be between MW-1 and test pit 4, due to the lack of soil contamination found in the soil samples from MW-1. This excavation was designated Excavation Area 3 and encompassed the southwest comer of Site No. 1, and virtually all of Site No. 2, except where the backhoe was prevented from going further by the building on Site No. 2 and the north and east property boundaries.

ISSUE

The issue presented is whether the Department correctly determined that one occurrence exists at the sites.

RELEVANT STATUTES

Wis. Stat. §101.143 (1) provides as follows:

(1) DEFINITIONS. In this section:

(cs) "Occurrence" means a contiguous contaminated area resulting from one or more petroleum products discharges.

(fg) "Petroleum product storage system" means a storage tank that is located in this state and is used to store petroleum products together with any onsite integral piping or dispensing system. The term does not include pipeline facilities; tanks of 110 gallons or less capacity; residential tanks of 1,100 gallons or less capacity storing petroleum products that are not for resale; farm tanks of 1,100 gallons or less capacity storing petroleum products that are not for resale, except as provided in sub. (4)(ei); tanks used for storing heating oil for consumptive use on the premises where stored, except for heating oil tanks owned by school districts and heating oil tanks owned by technical college districts and except as provided in sub. (4)(ei); or tanks owned by this state or the federal government.

(i) "Underground petroleum product storage system" means an underground storage tank used for storing petroleum products together with any on-site integral piping or dispensing system with at least 10% of its total volume below the surface of the ground.

Wis. Stat. §101.143 (4)(d) provides as follows:

(d) Awards for claims; underground systems. 1. The department shall issue an award under this paragraph for a claim filed after July 31, 1987, for eligible costs, under par. (b), incurred on or after August 1, 1987, and before December 22, 2001, by the owner or operator of an underground petroleum product storage system and for eligible costs, under par. (b), incurred on or after December 22, 2001, by the owner or operator of an underground petroleum product storage tank system if the petroleum product discharge on which the claim is based is confirmed and activities under sub. (3)(c) or (g) are begun before December 22, 2001.

2. The department shall issue the award under this paragraph without regard to fault in an amount equal to the amount of the eligible costs that exceeds a deductible amount of $2,500 plus 5% of the eligible costs, but not more than $7,500 per occurrence, except that the deductible amount for a petroleum product storage system that is owned by a school district or technical college district and that is used for storing heating oil for consumptive use on the premises is 25% of eligible costs. An award under this paragraph may not exceed the following for each occurrence:

a. For an owner or operator of an underground petroleum product storage tank system that is located at a facility at which petroleum is stored for resale or an owner or operator of an underground petroleum product storage tank system that handles an average of more than 10,000 gallons of petroleum per month, $1,000,000.

PROPOSED DISCUSSION AND CONCLUSIONS OF LAW

The appellant contends that there are two separate occurrences at the Sites, while the department contends that only one occurrence exists at the Sites. The dispute centers primarily on the groundwater and soil sample results in the vicinity of MW-14, which was located southeast of the former pump islands on Site No. 1. The appellant argues that field observations and the analytical data demonstrate that the source of the contamination in that vicinity was the former UST system on Site No. 2. The department argues that the data demonstrate that the source of the contamination in that vicinity was the former pump islands on Site No. 1

If there are two separate occurrences on the Sites, the appellant would be entitled to reimbursement of eligible costs up to $1,000,000 per occurrence. If there is only one occurrence, the appellant's reimbursement for eligible costs for both Sites would be capped at $1,000,000 in total.

APPELLANT'S POSITION

SOIL CONTAMINATION

The appellant's contends that the soil contamination removed from Excavation Area 2 did not commingle with the soil contamination removed from Excavation Area 3. In support of its position, the appellant's hydrogeologist noted that no contaminants above soil cleanup standards were detected in soil samples obtained from the southwest wall of Excavation Area 3 on Site No. 1 closest to Excavation Area 2, and that no contaminants were detected in the sidewall and floor samples from Excavation Area 2, other than a GRO detect of 11.7 ppm.[4] As further evidence for two separate occurrences, the appellant's hydrogeologist noted that MW-5R, located between Site No. 2 and MW-3 (which had the highest groundwater contamination concentrations on Site No. 1), has not exhibited soil or groundwater contamination above detection limits. In its brief, the appellant argues that the massive extent of soil contamination on Site No. 2 further supports its position for two occurrences because low to moderate levels of DRO were present throughout the extent of Excavation Areas 1 and 3, and were consistently associated with higher GRO concentrations in the same samples, and that DRO was absent when GRO was absent. The appellant maintains those results demonstrate that the sample analyses were measuring different portions of the same gasoline release or releases that caused contamination in Excavation Area 1 and 3.

The appellant acknowledges that the southwestern reach of Excavation Area 3 on Site No. 1 is a fair distance from the UST's formerly located on Site No. 2, but maintains that the area was just down gradient from several pump islands and associated distribution piping formerly located on Site No. 2. The appellant asserts that the former presence of those pump islands explains the distribution of contamination across Site No. 2 and is the likely source of contamination extending across the property boundary and onto the southeastern portion of Site No. 1.

[4]At the time the sample was taken in December of 1993, the cleanup standard was 10 ppm. However, at the time work began on Excavation Area 3 in 1994, the cleanup standard in effect was 100 ppm.

GROUNDWATER CONTAMINATION

The appellant also asserts that the former gasoline operations on Site No. 2 are the most likely source area for the groundwater contamination detected at MW-14. The appellant notes that the pre-remediation groundwater flow at the Sites was to the south-southwest. Based on the groundwater flow direction, the appellant asserts that the groundwater contamination detected at MW-14 was not contiguous with the groundwater contamination detected at MW-3 because MW-14 was southeast of MW-3.

The appellant's hydrogeologist noted that groundwater elevation date indicated a significant change in groundwater flow direction only after completion of Excavation Area 3, at which point recharge of groundwater to the extraction backfill caused water to flow from the former pump islands on Site No. 1 toward MW-14. The hydrogeologist opined that if the soils beneath the former pump island on Site No. I had been the source of groundwater contamination detected at MW-14, then residual contamination would have been expected to migrate through the porous backfill of Excavation Area 3 and re-emerge at MW-14R, which was located on Site No. 1 just slightly northeast of MW-14. The appellant points out that no contamination has ever been detected at MW-14R.

Based on this data, the appellant maintains that there are two distinct areas of soil contamination on the Sites and that there are two distinct plumes of groundwater contamination on the Sites. Additionally, the appellant maintains that groundwater contamination plume on Site No. 1 is not contiguous with the physical extent of soil contamination from Site No. 2 and vice versa.

DEPARTMENT'S POSITION

SOIL CONTAMINATION

The department contends that there was a source of the contamination in the area of the former pump islands on Site No. 1 in the vicinity of MW-14. As support for its position, the department's hydrogeologist noted that soil sample 2 taken from the former pump islands on Site No. 1 at time of tank removal detected contamination. She also noted that TP4 in that vicinity had high levels of contamination at shallower depths than the bottom to the USTs would have been.

The department's expert further opined that the tank system release on Site No. 2 was not the source of contamination in the vicinity of MW-14 based on the benzene concentrations detected in soil samples 2, 12 and 13 taken near MW-14 on Site No. 1. She explained that those samples were located a great distance from the source area on Site No. 2 and were taken at depths shallower than what the bottom of the UST's would have been. The department's witness also noted that the samples exhibited higher contamination than samples taken at the mutual property boundary and therefore closer to source area on Site No 2. It was her opinion that the presence of another source of contamination on Site No. 1 was the only way to explain those sample results.

The department's hydrogeologist also testified that contamination releases from pump islands generally occur from leaks at piping elbows at depths of two to four feet. She asserted that the sidewall samples from Excavation Area 3 relied upon by the appellant to show a break in the contamination were too deep and that contamination may have been shallower in those areas. It was also her opinion that the absence of contamination above cleanup standards in those samples did not establish that contamination had not migrated from the former pump islands on Site No. 1. The department also points out that soil sample #37 from Excavation Area 2 did detect levels of contamination above cleanup standards. The department also questioned why no sampling was done in the area of TB-2, which was apparently the impetus for Excavation Area 2.

The department further points out that soil samples from the majority of monitoring wells on the Sites detected low levels of contamination, and therefore that the lack of contamination detected in the soil sample at MW-5R provides no helpful information. Additionally, the department points out that no sampling, pursuant to Wis. Admin. Code ILHR §110, was done along the piping runs from the former UST locations on Site No. I to the pump islands on Site No. 1. The department asserts that had such testing been done, there would be conclusive proof of the presence or absence of contamination in those areas.

Finally, the department argues that the soil sample from test pit 4 on Site No. 1, located near the former pump islands, detected higher levels of contaminants at a shallower depth than the contamination detected in the soil samples from test pit 3, which was located nearer the contamination source on Site No. 2. The department argues that those results demonstrate that the contamination on Site No. 1 in the vicinity of MW-14 could not have originated from the source of contamination on Site No. 2.

GROUNDWATER CONTAMINATION

The department asserts that the groundwater samples from MW-5R do not provide any information on whether groundwater contamination existed under the former pump islands on Site No. 1. The department therefore asserts that the appellant is not justified in using those results to show a break in the contamination.

The department's hydrogeologist testified that since MR-14R surrounded by the new sand backfill any leaching of contaminants from beneath the former pump islands toward MW14R would encounter more water and become diluted. Additionally, the department argues that if the pre-remediation groundwater flow direction was as asserted by the appellant then groundwater contamination should have had detects similar to those of MW-14 because MW-1 was downgradient from MW- 14 and Site No. 2. The department points out that the appellant had not provided an answer.

Finally, the department notes that soil sampling from MW-3, and MW-6 did not detect high levels of contamination in the soil to indicate that they were source areas but that groundwater samples from those same locations exhibited high levels of contamination indicating source areas. The department also notes that groundwater results from MW-14 detected higher levels of benzene than did results from MW-6. MW-3 and MW-6 were placed in areas where USTs had been removed. The department argues that similar results in the vicinity of MW-14 demonstrate that it was also located at or near a source of contamination, which had to have been the former pump islands on Site No. 1.

PROPOSED DISCUSSION

The parties disagree as to the source area for the contamination detected in the vicinity of MW-14 located in Excavation Area 3 on Site No. 1. The record presents two competing and logical explanations of the data supporting both parties' positions. The burden was upon the appellant to show that its conclusions were more reasonable than the department's conclusions.

Each parties' expert generally agreed that contamination flows downward and outward from a source area. Therefore, in order to draw meaningful conclusions from the soil sample data it is important to know the depth at which contamination occurred from a source area. Although one of the soil samples taken from the former pump islands on Site No. I at the time of tank removal activities detected contamination above cleanup standards, the record contains no evidence of the depth of that soil sample.

The absence of such information renders it nearly impossible to evaluate the conclusions drawn by the parties from the sidewall sample results from Excavation Area 3.

Similarly, meaningful evaluation of the conclusions drawn from the benzene concentrations detected in the soil samples depends on the parties' assumptions about the depth at which the leaks occurred. The department's conclusion that the greater benzene concentrations detected in soil samples taken in the vicinity of MW-14 demonstrate that those samples were near a source area assumes that the source of the release was the bottom of the USTs on Site No. 2. If that was the case, then the department's conclusions from the data are compelling. In its brief, the appellant argues that it is obvious that pump islands must have existed to the southeast of the building on Site No. 2, and that the presence of those pump islands and associated distribution piping explain the distribution of contamination across Site No. 2. Given the testimony about the depth at which leaks customarily occur at pump islands, competent and persuasive evidence of the existence and location of such pump islands might have convincingly refuted the department's conclusions drawn from the same data. However, the appellant presented no non-hearsay evidence to establish the existence and location of such islands and associated piping or that any leaks occurred from those "alleged" pumps. Additionally, the appellant did not refute similar conclusions drawn by the department from the test pit data.

Each party argued that the sidewall sample results supported their positions. The department maintained that the contamination from the former pump islands on Site No. 1 might have been shallower then the depths at which the sidewall samples from Excavation Area 5 were taken. The appellant countered that if the benzene levels detected in the soil samples taken in the vicinity of MW-14 had migrated from the former pump islands on Site No. 1 then contamination of similar or higher levels would have been detected in the sidewall samples taken near the former pump islands. However, neither party presented any evidence to assist the decision maker in determining what level of contamination should be expected at various depths based on the known soil sample concentrations detected.

The parties similarly disputed the conclusions to be drawn from the groundwater data from the Sites. The appellant's expert maintained that the lack of contamination detected at MW-1 was the best evidence that no groundwater contamination existed under the former pump islands because that monitoring well was downgradient from the former pump islands on Site No. 1. However, the appellant did not explain why the plume of contamination detected at MW-14, which it maintained was caused by contamination migrating from Site No. 2, was not also detected in MW-1, which was also downgradient from MW-14 and Site No. 2.

The parties generally agreed that residual contamination from the former pump islands on Site No. 1 would be diluted when migrating through the backfill placed in Excavation Area 3. Under those circumstances, the lack of contamination detected at MW-14R is only marginally persuasive. Both parties generally agreed that the sources of groundwater contamination detected at MW-3, MW-5 and MW-6 were fairly obvious in that each monitoring well was placed in areas where petroleum product storage tanks had been removed. The departmental expert noted that soil and groundwater concentrations detected at MW-14 acted like those other source areas on the Sites, particularly MW-3 which had no soil contamination above clean-up standards but extensive groundwater contamination. While the appellant argued that the extensive soil contamination on Site No. 2 was the most likely source area for the groundwater contamination detected at MW-14, it chose not to cross-examine the departmental expert's contrary conclusions from that same data.

At one point, the appellant's consultant considered the former pump islands on Site No. 1 to constitute a source area. Although the appellant asserted that the extent of that contamination had been excavated, it appears from the consultant's own diagrams that the excavation area did not encompass the

area of contamination detected by the tank removal soil sampling. Moreover, the appellant's consultant failed to conduct soil sampling along the piping runs or in the vicinity of test boring 2, which was the impetus for excavation in that area. Similarly, no groundwater testing was done under the former pump islands. Had such testing been conducted, it might have provided conclusive evidence of the presence or absence of contamination in the vicinity of the former pump islands on Site No. 1.

Under the circumstances, the state hearing officer must conclude that the appellant did not meet its burden of establishing its position to the exclusion of the department's position.

PROPOSED CONCLUSIONS OF LAW

The appellant has the burden of proving that the PECFA program's determination that one occurrence exists at the Sites was in error.

The appellant has not established that two occurrences exist at the site. The record in this matters demonstrates one occurrence exists at the Sites within the meaning of Wis. Stat. §101.143(l)(cs).

The appellant therefore has not met its burden of establishing that the department's determination was unreasonable.

PROPOSED DECISION

The department's decision of October 24, 1997, finding that one occurrence exits at the Sites is affirmed.

By

James H. Moe
State Hearing Officer